Supreme Court, U.S.
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No. 95-3

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

KIRK M. BROWN,
Petitioner,

v.

THADDEUS KILGORE, JR.,
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION,
AFSCME,
LOCAL 11, AFL-CIO, AND
STATE EMPLOYMENT RELATIONS BOARD,
Respondents.

On Petition for a Writ of Certiorari to
the Supreme Court of Ohio

RESPONDENT STATE EMPLOYMENT RELATIONS BOARD'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner asks this Court to review a decision of the Supreme Court of Ohio which holds that a determination by Respondent State Employment Relations Board [hereinafter SERB] to dismiss an unfair labor practice charge for lack of probable cause is not reviewable on appeal pursuant to Ohio Rev. Code Ann. Ch. 119 or Ohio Rev. Code Ann. §§ 4117.02(M) and 4117.13(D). *See Ohio Ass'n of Pub. School Employees, Chapter 643, AFSCME, AFL-CIO v. Dayton City School Dist. Bd. of Educ.*, 59 Ohio St. 3d 159, 161, 572 N.E.2d 80, 83 (1991) [hereinafter *Dayton*]. The Ohio courts relied on the *Dayton* decision to determine that there is no right to judicial review of such determination in the instant case.

Petitioner filed an unfair labor practice charge with SERB alleging that Respondents Thaddeus Kilgore, Jr. and Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO committed certain unfair labor practices. SERB investigated the charge pursuant to Ohio Rev. Code Ann. § 4117.12(B). Under that statute, SERB is empowered to issue a complaint and prosecute a case only if it finds that there is probable cause of a violation of Ohio Rev. Code Ann. § 4117.11. In the instant case, SERB determined that there was no probable cause and thus did not issue a complaint. Consequently, SERB dismissed the unfair labor practice charge. Petitioner appealed SERB's determination through two lower Ohio courts and the Supreme Court of Ohio. Each court rejected Petitioner's argument.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Decision Below Does Not Conflict With Any Decision Of This Court Or Any United States Circuit Court Of Appeals.

The Supreme Court of Ohio noted in its *Dayton* decision "that the procedures for unfair labor practice cases mandated by R.C. 4117.12 and 4117.13 are substantively identical to those established in Section 10 of the National Labor Relations Act to govern unfair labor practice cases before the National Labor Relations Board." *Dayton*, 59 Ohio St. 3d at 161, 572 N.E.2d at 83. A decision by the General Counsel of the National Labor Relations Board [hereinafter NLRB] to not prosecute is not reviewable by the NLRB or a court. *See George Banta Co., Inc. v. N.L.R.B.*, 626 F.2d 354, 356 (4th Cir. 1980). This Court and all of the United States Circuit Courts of Appeals that have addressed the issue of judicial review in the instant context have uniformly held that the absence of a right of appeal from a decision not to issue an unfair labor practice complaint does not violate the Due Process Clause of the United States Constitution.[1]

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[1] *See N.L.R.B. v. United Food & Commercial Workers Union*, 484 U.S. 112, 122, 108 S. Ct. 413, 420, 98 L. Ed. 2d 429 (1987); *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 138-39, 95 S. Ct. 1504, 1510-11, 44 L. Ed. 2d 29 (1975); *Vaca v. Sipes*, 386 U.S. 171, 182, 87 S. Ct. 903, 912, 17 L. Ed. 2d 842 (1967); *District Lodge 64, Int'l Ass'n of Machinists v. N.L.R.B.*, 949 F.2d 441, 446 n.1 (D.C. Cir. 1991); *Jackman v. N.L.R.B.*, 784 F.2d 759, 764 (6th Cir. 1986); *Int'l Ass'n of Machinists, Etc. v. Lubbers*, 681 F.2d 598, 602-03 (9th Cir. 1982); *Pacific Southwest Airlines v. N.L.R.B.*, 611 F.2d 1309, 1311 (9th Cir. 1980); *Associated Builders & Contractors, Inc. v. Irving*, 610 F.2d 1221, 1225, (4th Cir. 1979), *cert. denied sub nom. Associated Builders*

The NLRB has been operating under this administrative scheme, one that is substantively identical to SERB's, for over fifty years. Because of the similarity of the SERB and NLRB processes, it is clear that the absence of any right to judicial review of SERB's dismissal of an unfair labor practice charge for lack of probable cause does not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

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v. Lubbers, 446 U.S. 965, 100 S. Ct. 2941, 64 L. Ed. 2d 823 (1980); *Bays v. Miller*, 524 F.2d 631, 634 (9th Cir. 1975); *Hernandez v. N.L.R.B.*, 505 F.2d 119, 120 (5th Cir. 1974); *Int'l Ladies' Garment Workers Union v. N.L.R.B.*, 501 F.2d 823, 830 (D.C. Cir. 1974); *Newspaper Guild, Erie Newspaper Guild v. N.L.R.B.*, 489 F.2d 416, 425 (3d Cir. 1973); *Saez v. Goslee*, 463 F.2d 214 (1st Cir.), *cert. denied*, 409 U.S. 1024, 92 S. Ct. 466, 34 L. Ed. 2d 316 (1972); *N.L.R.B. v. Int'l Bhd. of Elec. Workers, Local 357*, 445 F.2d 1015, 1016 (9th Cir. 1971); *Mayer v. Ordman*, 391 F.2d 889, 889-90 (6th Cir.), *cert. denied*, 393 U.S. 925, 89 S. Ct. 257, 21 L. Ed. 2d 261 (1968); *Balanyi v. Local 1031, Int'l Bhd. of Elec. Workers*, 374 F.2d 723, 725-26 (7th Cir. 1967); *United Elec. Contractors Ass'n v. Ordman*, 366 F.2d 776, 776 (2d Cir.), *cert. denied*, 385 U.S. 1026, 87 S. Ct. 753, 17 L. Ed. 2d 674 (1966); Wellington Mill Div., West Point Mfg. Co. v. N.L.R.B., 330 F.2d 579, 590-91 (4th Cir.), *cert. denied*, 379 U.S. 882, 85 S. Ct. 144, 13 L. Ed. 2d 88 (1964); *Division 1267, Amalgamated Ass'n of Street, Elec. Ry., & Motor Coach Employees v. Ordman*, 320 F.2d 729, 730 (D.C. Cir. 1963); *General Drivers, Local 886 v. N.L.R.B.*, 179 F.2d 492, 494-95 (10th Cir. 1950). *Cf. Int'l Bhd. of Boilermakers, Local 6 v. N.L.R.B.*, 872 F.2d 331, 332 (9th Cir. 1989)("[I]f General Counsel's decision to withdraw his complaint was an act of 'prosecutorial discretion,' there is no opportunity for judicial review.").

II. The Petition Does Not Present A Substantial Federal Constitutional Question.

Petitioner contends, without citing any relevant cases, that his constitutional rights have been abridged because of the absence of a right of judicial review. However, in the context of this case, he has no private right to enforce the unfair labor practice provisions established by Ohio Rev. Code Ann. § 4117.11 without the participation of SERB. Under Ohio's statutory format, the rights at issue in these proceedings are public in nature. When a complaint is filed by SERB, the case is prosecuted at public expense in the name of the state. Any remedy or right ultimately accruing to the benefit of a private person is akin to the notion of a third party beneficiary. Thus, SERB's decision not to prosecute does not determine any private rights of any specified person since SERB's actions are on behalf of the public and not any specified person. In further explaining its conclusion that there is no right of appeal from SERB's decision not to issue a complaint, the Supreme Court of Ohio also noted that the Ohio General Assembly "has made its intent known in plain and unambiguous terms [to make such SERB determinations *not* subject to judicial review], and we have no power to 'construe' the statute to reach a different result." *Dayton*, 59 Ohio St. 3d at 161, 572 N.E.2d at 83.

When pursuing statutory remedies, it is hornbook law that there is no inherent or constitutional right of appeal[2] and

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[2] *Cf. Railroad Co. v. Grant*, 98 U.S. 398, 401, 25 L. Ed. 231 (1879)("[A] party to a suit has no vested right to an appeal or a writ of error from one court to another.")

that any such right exists only if provided by statute.[3] Because the Petitioner has presented no substantial (or even colorable) federal constitutional question, his petition for writ of certiorari should be denied.

III. The Issues Presented In The Petition Are Issues Of State Law That Have Been Fairly, Properly, And Recently Decided With Clarity By The Supreme Court Of Ohio.

Petitioner's unfair labor practice charge was brought pursuant to state law. *See* Ohio Rev. Code Ann. § 4117.12(B) (Anderson 1991). The Supreme Court of Ohio's thorough and well-reasoned opinion in *Dayton* fairly and properly addressed the issues raised in the instant petition. That decision comports with a long line of federal case law examining analogous NLRB procedures. Therefore, the Supreme Court of Ohio's recent *Dayton* and *OAPSE* decisions should not be reviewed by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Supreme Court of Ohio should be denied.

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[3] This Court should also note that, while no right of appeal is provided by statute, the Petitioner is not without remedy. In *State ex. rel. Ohio Assn. of Pub. School Employees/AFSCME, AFL-CIO v. State Employment Relations Bd.*, 64 Ohio St. 3d 149, 153, 593 N.E.2d 288, 292 (1992) [hereinafter *OAPSE*], the Supreme Court of Ohio reaffirmed its *Dayton* holding, but went on to rule that judicial review of a SERB determination is available via an action in mandamus.

Respectfully submitted,

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